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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Andre William Armstrong,
Plaintiff,

vs.

Brotherton, et al.,
Defendants.

No. CV 13-1264-PHX-DGC (BSB)

ORDER

Plaintiff Andre William Armstrong, who is confined in the Maricopa County Fourth Avenue Jail, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1), an Application to Proceed *In Forma Pauperis* (Doc. 2), and a Motion to Appoint Guardian Ad Litem (Doc. 5). The Court will dismiss the Complaint with leave to amend and appoint counsel.

I. Application to Proceed *In Forma Pauperis* and Filing Fee

Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$10.00. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

...

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

III. Complaint

Plaintiff names the following Defendants in the Complaint: Maricopa County Superior Court Judge Brotherton; Maricopa County Sheriff Joseph M. Arpaio; and Officers of the Court J.S. Jed. and O.E. Smith.

Plaintiff raises two claims for relief. In Count One, Plaintiff claims his Fifth and Fourteenth Amendment rights were violated when, on May 20, 2013, Defendant Brotherton ordered Defendants Jed and Smith to “jump on [Plaintiff] in the hallway . . . after [Plaintiff] informed the clerk that . . . [he] was having a medical problem.” Plaintiff claims that he called 911 and the Defendants “jumped on [him] and dragged [him] into the court room.” Plaintiff claims that he started crying and blacked out and that “they took [his] bond money.” In Count Two, Plaintiff alleges the same facts and claims Defendants Jed and Smith used excessive force against him in violation of the Eighth Amendment. Plaintiff seeks injunctive relief and money damages.

The Maricopa County Superior Court docket indicates that on May 20, 2013, the Maricopa County Superior Court revoked Plaintiff’s release conditions and remanded Plaintiff to the custody of the Maricopa County Sheriff’s Office. On July 2, 2013, the Maricopa County Superior Court found Plaintiff criminally incompetent and incompetent to refuse treatment and committed Plaintiff to the Maricopa County Correctional Health Services Restoration Program.¹

¹ See July 2, 2013 Minute Entry in *Arizona v. Armstrong*, Maricopa County Superior Court case #CR2010-102059-002 DT, <http://www.courtminutes.maricopa.gov/docs/Criminal/072013/m5842816.pdf> (last visited Jan. 29, 2014).

1 **IV. Failure to State a Claim**

2 **A. Defendant Brotherton**

3 Judges are absolutely immune from § 1983 suits for damages for their judicial acts
 4 except when they are taken “in the clear absence of all jurisdiction.” *Stump v. Sparkman*,
 5 435 U.S. 349, 356-357 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).
 6 An act is “judicial” when it is a function normally performed by a judge and the parties
 7 dealt with the judge in his or her judicial capacity. *Stump*, 435 U.S. at 362; *Crooks v.*
 8 *Maynard*, 913 F.2d 699, 700 (9th Cir. 1990). In this case, Plaintiff’s only allegation
 9 regarding Defendant Brotherton is that he directed Defendants Jed and Smith to bring
 10 Plaintiff back into the courtroom. These actions were performed within Defendant
 11 Brotherton’s judicial capacity and Defendant Brotherton is therefore immune from suit.

12 **B. Defendant Arpaio**

13 To state a valid claim under § 1983, plaintiffs must allege that they suffered a
 14 specific injury as a result of specific conduct of a defendant and show an affirmative link
 15 between the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362,
 16 371-72, 377 (1976). Plaintiff makes no allegations against Defendant Arpaio and
 17 therefore fails to state a claim against him.

18 **C. Defendants Jed and Smith**

19 The Fourteenth Amendment Due Process clause, not the Eighth Amendment,
 20 protects pretrial detainees from excessive force that amounts to punishment. *Gibson v.*
 21 *County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). “[T]he Fourth Amendment sets
 22 the ‘applicable constitutional limitations’ for considering claims of excessive force during
 23 pretrial detention.” *Id.* (quoting *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th
 24 Cir. 1996).

25 The Fourth Amendment does not prohibit the use of reasonable force. *Tatum v.*
 26 *City & County of San Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006). Whether the force
 27 was excessive depends on “whether the officers’ actions [were] ‘objectively reasonable’
 28 in light of the facts and circumstances confronting them, without regard to their

1 underlying intent or motivation.” *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Tatum*,
 2 441 F.3d at 1095; *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003). The
 3 Court must balance the nature and quality of the intrusion against the countervailing
 4 governmental interests at stake. *Graham*, 490 U.S. at 396; *Lolli*, 351 F.3d at 415.
 5 Moreover,

6 [t]he “reasonableness” of a particular use of force must be
 7 judged from the perspective of a reasonable officer on the
 8 scene, rather than with the 20/20 vision of hindsight. . . .
 9 “Not every push or shove, even if it may later seem
 unnecessary in the peace of a judge’s chambers,” violates the
 Fourth Amendment.

10 *Graham*, 490 U.S. at 396 (citations omitted). The due process clause does not protect a
 11 pretrial detainee from the use of all force, but only from the use of excessive force that
 12 amounts to punishment. *Id.* at 395.

13 In evaluating a due process claim alleging excessive force, the court should
 14 consider: (1) the need for the application of force, (2) the relationship between the need
 15 and the amount of force use; (3) the extent of the injury inflicted, and (4) whether force
 16 was applied in a good faith effort to maintain and restore discipline. *White v. Roper*, 901
 17 F.2d 1501, 1507 (9th Cir. 1990). Assuming all facts alleged by Plaintiff are true,
 18 Plaintiff’s allegations fail to demonstrate that the use of force in this case was
 19 unreasonable. Plaintiff’s release conditions were revoked, Plaintiff left the courtroom to
 20 call 911, and Defendants Jed and Smith were directed to bring Plaintiff back to the
 21 courtroom. Plaintiff alleges Defendants Jed and Smith “dragged” him back to the
 22 courtroom, he started crying, and then “blacked out.” Plaintiff claims he suffered
 23 emotional distress and mental anguish, but alleges no physical injury.

24 Plaintiff’s facts show that although Plaintiff may not have been attempting to
 25 “escape,” Plaintiff did leave the courtroom after his release had been revoked and that
 26 Defendants Jed and Smith acted with what appears to be the minimum force necessary to
 27 return Plaintiff to the courtroom. Plaintiff does not allege that he suffered physical injury
 28 and it appears that Defendants Jed and Smith acted pursuant to instructions from the court

1 and with the purpose of restoring order. Plaintiff has therefore failed to state a claim
2 against Defendants Jed and Smith and these Defendants will be dismissed.

3 **V. Leave to Amend and Appointment of Counsel**

4 As no Defendants now remain, the Court will dismiss the Complaint. Because
5 Plaintiff's claims might be saved by the allegation of other facts, the Court will dismiss
6 the Complaint without prejudice and with leave to amend.

7 **VI. Motion to Appoint Guardian Ad Litem**

8 On August 2, 2013, Plaintiff filed a Motion to Appoint Guardian Ad Litem
9 (Doc. 5) in which he asks that the Court appoint a guardian ad litem for him in this case
10 because he is mentally incompetent. Plaintiff's criminal court records support this
11 assertion and indicate that he was formally adjudicated mentally incompetent.
12 Consideration of whether to appoint a guardian ad litem is therefore warranted under
13 Rule 17 of the Federal Rules of Civil Procedure.

14 Rule 17(c)(2) of the Federal Rule of Civil Procedure states that the Court "must
15 appoint a guardian ad litem – or issue another appropriate order – to protect a minor or
16 incompetent person who is unrepresented in an action." The Court will not appoint a
17 guardian ad litem, but recognizes that Plaintiff's mental incompetence renders him unable
18 to adequately protect his own interests or file an amended complaint. Accordingly, the
19 Court will appoint counsel to represent Plaintiff in this action. Attorney Sara M. Athen
20 has volunteered to accept Plaintiff's case and will be appointed as counsel for Plaintiff in
21 this matter.

22 **VII. Instruction to Appointed Counsel**

23 The Court will direct the Clerk of Court to send to Attorney Sara M. Athen copies
24 of Plaintiff's Complaint and this Order. Within 14 days of the filing date of this Order,
25 Attorney Sara M. Athen must file a Notice of Appearance. Within 60 days of the filing
26 date of this Order, Attorney Sara M. Athen must:

- 27 (a) meet and confer with Plaintiff,
28 (b) make a preliminary investigation of Plaintiff's claims, and

1 (c) either:

2 (1) file an amended complaint; or

3 (2) if she determines, pursuant to Federal Rule of Civil Procedure
4 11(b), that Plaintiff's claims are not warranted by existing law
5 or that his factual contentions lack evidentiary support, file a
6 notice explaining her findings and a motion to dismiss.

7 **VII. Instructions to Plaintiff**

8 The Court has appointed Attorney Sara M. Athen to represent Plaintiff.
9 Therefore, Attorney Sara M. Athen "shall be recognized by the Court and by all the
10 parties to the cause as having control of [Plaintiff's] case, in all proper ways, and shall, as
11 such attorney, sign all papers which are to be signed on behalf of the client." LRCiv
12 83.3(c)(2). Moreover, because Attorney Sara M. Athen is representing Plaintiff in this
13 case, Plaintiff cannot "appear or act in [his] own behalf in the cause, or take any steps
14 therein, unless an order of substitution shall first have been made by the Court after
15 notice to the attorney of each such party, and to the opposite party." LRCiv 83.3(c)(2).
16 This means that Attorney Sara M. Athen, not Plaintiff, shall file future documents in this
17 case.

18 **IT IS ORDERED:**

19 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 2) is **granted**.

20 (2) As required by the accompanying Order to the appropriate government
21 agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing
22 fee of \$10.00.

23 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim, with leave
24 to amend.

25 (4) Plaintiff's August 2, 2013 Motion to Appoint Guardian Ad Litem (Doc. 5)
26 is **denied in part** to the extent that the Court will not appoint a guardian ad litem, and
27 **granted in part** to the extent that the Court appoints counsel to represent Plaintiff in this
28 action.

(5) Attorney Sara M. Athen is appointed as counsel for Plaintiff in this action.

1 (6) The Clerk of Court **must send** to Attorney Sara M. Athen, **by certified**
2 **mail**, copies of Plaintiff's Complaint (Doc. 1) and this Order, at the following address:

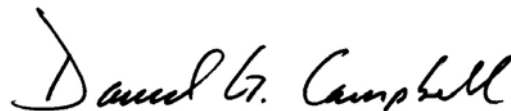
3 Sara M. Athen
4 Snell & Wilmer, LLP
5 400 E. Van Buren St.
6 Phoenix, AZ 85004-2202.

7 (7) Within **14 days** of the filing date of this Order, Attorney Sara M. Athen
8 must file a Notice of Appearance.

9 (8) Within **60 days** of the filing date of this Order, Attorney Sara M. Athen
10 must:

- 11 (a) meet and confer with Plaintiff,
- 12 (b) make a preliminary investigation of Plaintiff's claims, and
- 13 (c) either:
 - 14 (1) file an amended complaint; or
 - 15 (2) if counsel determines, pursuant to Federal Rule of Civil
16 Procedure 11(b), that Plaintiff's claims are not warranted by
17 existing law or that his factual contentions lack evidentiary
18 support, file a notice explaining counsel's findings and a
19 motion to dismiss.

20 Dated this 5th day of February, 2014.

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22 _____
23 David G. Campbell
24 United States District Judge
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